TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915

No. [redacted] 379 82

THE FAIRBANKS STEAM SHOVEL COMPANY, APPELLANT,

vs.

WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY OF FEDERAL CONTRACTING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED MARCH 2, 1914.

(24,077)

(24,077)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 926.

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vs.

WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY OF FEDERAL CONTRACTING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 30, 1914.

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1 Pleas in the District Court of the United States of America, within and for the Southern Division of the Southern District of Illinois, begun and held at the City of Springfield, in said Division and District, before the Honorable J. Otis Humphrey, Judge of said Court, on Thursday the 21st day of August in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America, the one hundred and thirty-eighth. Placita.

State-
ment
filed
Sept.
5, 1913.

22 And afterwards, to wit: on the 15th day of September A. D. 1913, there was filed in the office of the Clerk of this Court a certain, Agreed Statement, which said Agreed Statement was and is in the words and figures, following, to wit:

23 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

In the Matter of
Federal Contracting
Company, Bankrupt.

Federal Contracting Company,
Petitioner,
vs.
The Fairbanks Steam Shovel Company
Defendant.
Petition for Injunction.

Agreed statement pursuant to 77 of the Rules of Practice for Courts in Equity.

It is hereby agreed by and between the parties to the above entitled cause that the following is a statement of the manner in which the questions for decision arose and were decided in the District Court, and of the facts alleged and proven so far as is essential to the decision of the questions by the Appellate Court.

How the questions arose.

1. On December 30, 1912, certain petitioning creditors filed in the said District Court their petition, praying that Federal Contracting Company be adjudicated a bankrupt and on March 25, 1913, on that petition, Federal Contracting Company was duly adjudicated a bankrupt.

2. On March 6, 1913, The Fairbanks Steam Shovel Company (without any knowledge of the fact that said petition in bankruptcy had been filed except so far as the filing of the petition is to be continued on notice) took possession of
24 the dredge in controversy under a chattel mortgage and at once advertised the same for sale, pursuant to the

terms of the chattel mortgage and the Statutes of the State of Illinois.

3. On March 26, 1913, Federal Contracting Company filed in the said District Court in said bankruptcy proceedings its petition against The Fairbanks Steam Shovel Company, in which it alleged that it, Federal Contracting Company, was on March 25, 1913, adjudicated a bankrupt in said court. That The Fairbanks Steam Shovel Company was holder of a chattel mortgage on a certain dredge. That said mortgage was given in June, 1912, to secure about $12,230 and interest. That said chattel mortgage was not acknowledged or recorded in Cook County, Illinois, in which county the principal office of Federal Contracting Company was located by its charter. That petitioner is informed and believes that said chattel mortgage is invalid as against the rights of any trustee who may be appointed in said bankruptcy proceedings. That The Fairbanks Steam Shovel Company has taken possession of the mortgaged dredge and posted up notice of sale and proposes to sell the dredge on March 28, 1913. That if permitted to proceed with the sale, the dredge will probably be sold for much less than its value and prays an injunction, restraining the sale, etc.

4. The same day a temporary restraining order was made by the said District Court and served. The Fairbanks Steam Shovel Company on April 9, 1913, filed its answer to the said petition of Federal Contracting Company. It admitted that it held the chattel mortgage upon the dredge as alleged. Alleges that the chattel mortgage was duly executed to it by Federal Contracting Company and says that at the time of the execution thereof, the officers of Federal Contracting Company represented to it that Federal Contracting Company was of Beardstown, Cass County, Illinois, and that in their correspondence, the officers of Federal Contracting Company, by their letter heads, represented that the principal place of business of Federal Contracting Company was in Beardstown, in Cass County, Illinois. Alleges that it, The Fairbanks Steam Shovel Company, built the dredge for Federal Contracting Company at Beardstown, Cass County, Illinois, and that the chattel mortgage was to secure $12215.30 of the purchase price of said dredge.

Further respondent says that prior to the time when Federal Contracting Company was adjudicated a bankrupt, and on March 6, 1913, it took actual possession of the dredge in controversy, as provided for in the chattel mortgage, and has

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over since had and still has actual possession thereof, and it thereby perfected its title thereto before the adjudication in bankruptcy, and asks that the injunction be dissolved, etc.

5. As there was yet no trustee appointed for the estate of Federal Contracting Company, it was, with the approval of the District Court, stipulated that the sale under the chattel mortgage should proceed, and if the dredge should be purchased by The Fairbanks Steam Shovel Company, and this cause should finally be decided adverse to The Fairbanks Steam Shovel Company then it should turn the dredge over to the trustee, etc., and at the sale of the dredge, the same was purchased by The Fairbanks Steam Shovel Company.

6. On April 22, 1913, William V. Wills was duly appointed trustee of the Estate of Federal Contracting Company, Bankrupt, and thereafter appeared in this proceeding as such trustee in place of Federal Contracting Company.

7. As there were other dredges, formerly belonging to Federal Contracting Company, which were mortgaged to divers parties, who were petitioners in said bankruptcy proceed-
26 ing, asking that their rights as mortgagees be recognized by the District Court, and upon the hearing of which petitions, much of the same evidence would be necessary as in this cause, it was agreed that this cause, as the others, should be referred to E. S. Robinson, Referee in Bankruptcy, to take and report the proofs, together with his conclusions as to the law, and thereupon this cause was by the District Court referred to said Referee (in the nature of a special Master) to take and report the proofs, together with his conclusions in this cause. Pursuant to that order, the referee proceeded to and did take the testimony and made report, as directed, in and by which said report, the referee, among other things, found and concluded that the residence of Federal Contracting Company was in Cook County, Illinois, and not in Beardstown, in Cass County, Illinois, and that as the chattel mortgage of The Fairbanks Steam Shovel Company was not acknowledged and recorded in Cook County, Illinois, it was void as to the trustee in bankruptcy. The referee also found that the contentions of the trustee that the mortgage was not a valid mortgage were not well taken. Also that the title of the trustee dates from the time of filing the petition in bankruptcy and not from the date of adjudication and that by taking possession of the mortgaged dredge on March 6, 1913, The Fairbanks Steam Shovel Company did not perfect its title

as against the trustee, and also that under the amendment of 1910 to the Bankruptcy Act, the trustee can challenge any security or conveyance that a lien creditor or a judgment creditor could have challenged had bankruptcy proceedings not intervened, and the referee recommended that the motion to dissolve the injunction be overruled and that an order be made, directing The Fairbanks Steam Shovel Company to surrender the mortgaged dredge to the trustee in bankruptcy.

8. The Fairbanks Steam Shovel Company filed its exceptions to the report, finding and conclusions of the referee and specifically excepted to the finding that the residence of
27 Federal Contracting Company at the time of making the chattel mortgage in controversy was in Cook County, Illinois, and in refusing to find that its residence at that time was in Beardstown, in Cass County, Illinois, and also specifically excepted to the finding of the referee that by taking possession of the mortgaged dredge before the date of the adjudication in bankruptcy, The Fairbanks Steam Shovel Company did not perfect its title to the mortgaged dredge as against the trustee in bankruptcy, and in refusing to find that by so taking possession of the dredge, The Fairbanks Steam Shovel Company perfected its title to the dredge as against the trustee, and also excepted to the finding that the title of the trustee dates from the filing of the petition in bankruptcy, and also specifically excepted to the conclusion of the referee and prayed for a review and revision by the District Court.

Thereupon this cause was heard by the District Court upon the exceptions of The Fairbanks Steam Shovel Company to the report of the referee and on August 21, 1913, the District Court entered its final order and decree, overruling the exceptions to the report and approving and confirming it.

By its said final order and decree, the District Court decided that Federal Contracting Company at the time of the execution of the chattel mortgage in controversy, had its residence in the County of Cook, in the State of Illinois, and did not have its residence in Beardstown, in the County of Cass and State of Illinois, and therefore as the chattel mortgage was not acknowledged and recorded in Cook County, Illinois, it was void as to the trustee.

The District Court decided that The Fairbanks Steam Shovel Company by taking actual possession of the mortgaged dredge under its chattel mortgage on March 6, 1913, before

the date of adjudication in bankruptcy, did not thereby
28 perfect its title to the dredge as against the trustee in bankruptcy, and that the trustee in bankruptcy is entitled to the dredge for the general creditors of the bankrupt and that The Fairbanks Steam Shovel Company must surrender the dredge to the trustee, etc.

The facts are as follows:

On September 15, 1905, E. R. Carr, J. J. Moran and H. V. Speer filed in the office of the Secretary of State of the State of Illinois a statement for the purpose of forming a corporation, stating among other things that

The name of the corporation is Federal Contracting Company.

The object for which such corporation is founded is to do steam shovel and dredge work, etc.

The capital stock is $20,000.

"The location of the principal office is in the City of Chicago, in the County of Cook and State of Illinois."

A license was issued to said three persons as commissioners to open books for subscription to the capital stock, etc. The stock was subscribed and regular proceedings had and the first board of directors elected and the said commissioners made their report to the Secretary of State, their report being upon a printed form furnished by the said Secretary of State and in that report is the following: "and that the postoffice address of the business office of said company is at Nanka" Park Hotel, streets not numbered, in the City of Beardstown, in the County of Cass and State of Illinois." "All of which is printed except the words "Park Hotel, streets not numbered, Beardstown, and Cass, and the printed word "number" is crossed. Upon the receipt of which report on October 7, 1905, the Secretary of State issued a certificate of complete organization,
making a part thereof the first statement and the report
29 of the commissioners and other papers as the law requires.

The first meeting of the stockholders of Federal Contracting Company was held at Room 1413 First National Bank Building, Chicago, Illinois (which was the law office of the attorney who advised in the formation of the corporation) on October 3, 1905, and the next meeting at the same place on October 9, 1905, at which meeting all the stockholders were present and at which meeting the secretary was directed to record the charter in the Recorder's Office of the County of

Cass, Illinois. The charter was filed for record and recorded in Cass County, Illinois, on November 7, 1905, and afterwards, and on June 4, 1907, the charter was recorded in Cook County, Illinois, which was one year and eight months after the charter was issued. The stockholders held one other meeting in same room 1413 on June 6, 1907, to vote upon the increase of the capital stock. All other record meetings of the stockholders and directors were held at the office in Beardstown, Illinois.

For a few months after its organization, the company maintained an office in Chicago, when that office was abandoned and while that office was nominally maintained, it did not keep its records or books of account there nor did it transact any business there. Practically during its entire existence it had no actual office in Chicago.

From the time of its organization, it maintained an active office in Beardstown, Cass County, Illinois. Its records and books of account, etc., were kept in its office in Beardstown, Illinois. Its office furniture and fixtures and its office clerks were in its Beardstown office and its ordinary office business was done in that office. The secretary lived in Beardstown and was in charge of the office of the company at that place and made contracts for the company and was practically in the sole management of the company's business and managed it from the office in Beardstown. Its stationery had a printed heading which read "Federal Contracting Company of Beardstown, Illinois." In its yearly reports to the Secretary of State and to the Internal Revenue Collector it gave Beardstown, Illinois, as its principal office. So far as the practical conduct of its business was concerned, and to all outward appearances, its principal office was in Beardstown. Practically all of the meetings of its Board of Directors were held in Beardstown. Its postoffice address was Beardstown, Illinois, and a letter addressed to Federal Contracting Company, Chicago, Illinois, was returned to the writer. The place where Federal Contracting Company, as a matter of fact, had its home and business office was Beardstown, Illinois, and the place where it transacted such business as is usually transacted by a corporation at its principal office was at its office in Beardstown. To those having business dealings in person or by correspondence with the corporation, its principal office as a matter of fact was in Beardstown, Illinois.

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The Fairbanks Steam Shovel Company sold to Federal Contracting Company at Beardstown, Illinois, several dredges and all correspondence with regard to such sales was with Federal Contracting Company at Beardstown, Illinois, and on the stationery used in that correspondence by Federal Contracting Company was the heading "Federal Contracting Company of Beardstown, Illinois."

On September 6, 1907, Federal Contracting Company executed a written order, whereby it gave an order to The Fairbanks Steam Shovel Company for one two yard dredge complete, describing the machinery in detail, same to be delivered to it at Beardstown, Illinois, for the sum of $10,500, for which it agreed to give its notes as therein specified and which order contains this language: "and further agree at the time and place of delivery to give in security of said notes, a first mortgage on the above named machinery, and it is hereby
31 agreed that the title to the goods above ordered shall not pass until paid for in cash or until notes given for the same are fully paid and discharged but shall rest only in you and the property shall be yours until that time."

The Fairbanks Steam Shovel Company accepted the order and delivered the machinery (that is, the dredge in controversy) to Federal Contracting Company at Beardstown, Illinois, and upon its delivery, Federal Contracting Company executed its notes as the order provided and also executed a chattel mortgage upon the dredge to secure the notes, which chattel mortgage was acknowledged and recorded in Cass County, Illinois.

The notes secured by that chattel mortgage not having been paid, on June 8, 1912, new notes were executed by Federal Contracting Company for the balance remaining due and some additional indebtedness for repairs furnished, the new notes aggregating $12,215.30, and a new chattel mortgage was executed by Federal Contracting Company upon the same dredge to secure the new notes which new mortgage was acknowledged and recorded in Cass County.

The sole subscribers to the capital stock of Federal Contracting Company were T. J. Dolan, F. J. Traut and William Osner, all of whom were made directors. Osner was elected president and Traut secretary and treasurer. Since its organization, there has been no change in officers or stockholders. Dolan and Osner have resided all the time in Chicago and F. J. Traut in Beardstown, Cass County, Illinois. Traut, the secre-

tary and treasurer, made the company's contracts for drainage and levee works, purchased dredge boats and conducted the affairs of the corporation and his acts were acquiesced in by the other directors. The order given for the machinery in controversy above mentioned was signed "Federal Contracting Company by F. J. Traut, Secy and Treas." The first notes and mortgage given upon the dredge to secure the purchase price were also signed in the same way, "Fed-
32 eral Contracting Company, by F. J. Traut, Secy. and Treas." And the renewal notes and the mortgage in controversy were signed the same way, "Federal Contracting Company, by F. J. Traut, Secy. and Treas.", and the acknowledgment was Federal Contracting Company, by F. J. Traut, Secy and Treas.

There was no resolution by the Board of Directors, authorizing the execution of these notes or this chattel mortgage. The By-laws of Federal Contracting Company provide that no indebtedness exceeding $500 shall be incurred except by vote of the Finance Committee, which was composed of the Board of Directors.

F. J. Traut, Secretary and Treasurer, told the representative of The Fairbanks Steam Shovel Company, when the mortgage was given that he did not think he had authority to sign it and that it ought to be signed by the president.

On December 30, 1912, certain creditors of Federal Contracting Company filed their petition in the said District Court to have Federal Contracting Company adjudicated a bankrupt, and on March 25, 1913, Federal Contracting Company was duly adjudicated a bankrupt.

On March 6, 1913, Federal Contracting Company having made default in the payment of notes secured by the last above mentioned chattel mortgage, The Fairbanks Steam Shovel Company took possession of the mortgaged dredge and advertised it for sale pursuant to the terms of the mortgage and the laws of the State of Illinois. At the time The Fairbanks Steam Shovel Company so took possession of the dredge, its officers had no knowledge of the fact that a petition in
33 bankruptcy had been filed against Federal Contracting Company, excepting such constructive notice as may have been given by the filing of the petition.

There is still due The Fairbanks Steam Shovel Company on the notes and chattel mortgage $11,215.30 and interest.

Under the Municipal Court Act the City of Chicago was

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divided into five Municipal Districts. The Act gave the Judges of the Municipal Court authority to change the number of districts and the number of districts was changed to two Municipal Districts.

THE FAIRBANKS STEAM SHOVEL COMPANY,
By JOHN A. BELLATTI and
WALTER BELLATTI,
Its Attorneys.

WILLIAM V. WILLS,
Trustee in Bankruptcy of the Estate of Federal Contracting Company
By WILLIAM MUMFORD,
ELBERT C. FERGUSON,
JOHN C. BURCHARD,
His Attorneys.

Approved,
HUMPHREY,
Judge.

Indorsed, Agreed Statement, Filed Sep. 15, 1913, at 8 o'clock A. M. R. C. Brown, Clerk.

2 Be it remembered, that heretofore to-wit: on the 6th day of August in the year of our Lord one thousand nine hundred and thirteen, that being one of the days of the June Term, A. D. 1913, of said Court, there was filed in the office of the Clerk of the District Court of the United States for the Southern District of Illinois, a certain Report of Referee on Motion of Fairbanks Steam Shovel Company to dissolve Injunction, which said Report was and is in the words and figures, following, to wit:

21 IN THE DISTRICT COURT OF THE UNITED STATES

Southern District of Illinois

Southern Division.

In the Matter of Federal Contracting Company Bankrupt. } In Bankruptcy. No. 2238.

To The Honorable J. Otis Humphrey, Judge.

I, E. S. Robinson, Referee in Bankruptcy, to whom the motion to dissolve the order entered by the Court enjoining the Fairbanks Steam Shovel Company, from disposing of certain property held by it under a chattel mortgage given to said company by said bankrupt, with directions to take proof on same and report to the Court with my conclusions, thereon, hereby certify that in accordance with said order, I have heard all proofs offered by the parties in interest and the arguments of counsel thereon and make the following report and recommendations.

Springfield, Illinois, August 6, 1913.

E. S. ROBINSON,
Referee in Bankruptcy.

3 On December 30, 1912, an involuntary petition in bankruptcy was filed against the Federal Contracting Company, a corporation. On January 13, 1913, said corporation filed a denial of bankruptcy, and on March 25th, 1913, an adjudication of bankruptcy was made and the case referred to the Referee in Bankruptcy.

On March 28, 1913, the Federal Contracting Company filed a petition representing that the Fairbanks Steam Shovel Company, hereafter called the shovel company was the holder of a certain chattel mortgage on one floating steam dredge and its equipment, invalid as against the trustee in bankruptcy to be appointed, and that said shovel company had taken possession of said property and asking that said company be enjoined and restrained from selling same. Whereupon the court issued an order restraining said company or its agents from selling or disposing of said property until the further order of this Court.

On April 9, 1913, the shovel company filed its answer to said petition for restraining order and a motion to dissolve

ref- same. On April 18, 1913, the Court entered an order, by
ed 1913. agreement, authorizing the shovel company to proceed with sale of property, provided however, that if any person other than said company should purchase same the proceeds, less necessary expenses, should be deposited subject to the order of the Court upon final determination of the validity of lien under said chattel mortgage, and if said property was purchased by said company and it was determined that said company held no prior lien on same it should deliver possession of same to the trustee of the estate of bankrupt and be reimbursed for all proper expenses of caring for said property. The property was offered for sale and bid in by the shovel company.

On June 14, 1913, an order was entered referring the petition for restraining order and all questions involved in that proceedings to the Referee in Bankruptcy with directions to take the proof and report the same with conclusions to the Court.

4 STATEMENT OF FACTS.

of The Federal Contracting Company was incorporated under the laws of Illinois on the 7th day of October, 1905, its stated object being to do steam shovel and dredging work, all kinds of excavating, construction work and general contracting. By the articles of incorporation its principal office is located in Chicago, Cook County, Illinois. The authorized capital was $20,000 subscribed for as follows: T. J. Dolan, $6,700, F. J. Traut, $6,700, and Wm. Osner $6,600, all of whom were made directors. Osner was elected president and Traut secretary and treasurer. Since its organization there has been no change in officers or stockholders. Dolan and Osner have resided all the time in Chicago and Traut in Beardstown, Cass County, Illinois. For a few months after its organization the corporation maintained an office in Chicago but practically during its entire existence had no actual office in that city. It maintained an active office in Beardstown where its secretary lived. The secretary made its contracts for drainage and levee work, purchased dredge boats and conducted the business as his own. Its stationery read "Federal Contracting Company, of Beardstown, Illinois." In its yearly reports to the Secretary of State and to the Internal Revenue Collector it gave Beardstown as its principal office. So far as the practical conduct of its business and to all outward appearance its prin-

cipal office was in Beardstown. Practically all of the meetings of the board of directors were held in Beardstown except a meeting or two for the purpose of increasing the capital stock which were held in Chicago on advice of counsel to comply with Section 50 Chapter 32, Statutes of Illinois.

In 1907 The Fairbanks Steam Shovel Company sold Bankrupt a two yard dredge complete for $10,500. Bankrupt gave notes in payment and secured same by chattel mortgage. A part of the notes were not paid and on June 8, 1912, a new mortgage was given for $12,215.30 to secure the balance of the original purchase price and additional indebtedness created after the first mortgage was given, of which $1000 was paid before bankruptcy.

5 This mortgage was signed "Federal Contracting Company, per F. J. Traut, Secy.-Treas." acknowledged before a Justice of the Peace in Cass County and recorded in Cass County. It was not recorded in Cook County.

The trustee attacks the validity of this mortgage on four grounds:

First, that the corporation had no power to make a mortgage.

Second, the Secretary was not authorized by the board of directors to make it.

Third, that the property has not been properly identified.

Fourth, if the residence of the corporation was in Cook County the mortgage was not acknowledged and recorded in the county of its residence as required by Sections 2 and 4 Chapter 95 Statutes of Illinois.

The last named in my opinion is the only one that is tenable. The first is disposed of by Section 5 Chapter 32 of the Statutes of Illinois, relating to corporations which expressly provides that corporations for profit may pledge its property. The second cannot be maintained because the proof shows as stated before that the secretary conducted the affairs of the corporation practically as his private business and his acts including the giving of this mortgage were acquiesced in by the other directors who including its secretary were the only stockholders. Like most corporations that get into bankruptcy the minutes and records of this corporation were poorly kept and its business informally done. But it is well settled that acts of the officers of a corporation are the acts of the corporation if recognized and acquiesced in by the directors though not previously or formally authorized so long as such acts are within the corporate powers: Ashley Wire Company

v. Illinois Steel Company, 164 Ill. 149; Connett v. City of Chicago, 114 Ill. 233; Louisville New Albany & Chicago Ry. Co. v. Carson, 151 Ill. 444; State National Bank v. Union National Bank, 168 Ill. 519; Atwater v. American Exchange Bank, 152 Ill. 605. Mere formalities do not render a mortgage taken in good faith invalid. A corporation may enter into a written contract without a formal vote or written entry of a vote by the directors. Cook on Corporations sixth ed. vol. 3 pg. 2266. Thompson on Corporations, 2nd ed. vol. 2 pg. 943.

When a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person who takes it in good faith he may act on it. He is not bound to ascertain if all the acts of the directors were regular: Cook supra, page 2260. There is no question that the mortgage was taken in good faith for a proper consideration.

The property described in the mortgage is sufficiently identified.

The question of residence has given me more trouble and I am yet somewhat in doubt as to it but am constrained to find the legal residence of the corporation to be in Cook County.

Section 2 Chapter 32 Statutes of Illinois provides that when a license to organize a corporation is applied for the persons making such application shall state the location of the principal office. The location in the application in this case was given as Chicago and Section 50 provides that whenever the board of directors, managers or trustees of any corporation existing in Illinois may desire to change the name, or place of business, they may call a special meeting of the stockholders for the purpose of submitting the same to a vote of the stockholders. No such action was ever taken by bankrupt and no formal change of location was ever made.

A corporation has its domicil in the city or town in which its principal office is located by its certificate of organization: Galveston, Harrisburg & San Antonio Ry. Co. v. Gongales, 151 U. S. 496; Jenkins v. California Stage Co., 22 Cal. 537; Ex parte Schollenberger, 96 U. S. 369; Hewitt v. General Electric Co., 164 Ill. 420. A corporation is an artificial person and the Statutes of Illinois provide how its location shall be fixed and further provide how its location may be changed. Sections 2 and 50, Chapter 32. I find no Illinois authorities to the contrary. The cases cited by counsel for

the shovel company are chiefly railroad cases. Under the
7 laws of Illinois railroads for certain purposes have a residence in each county through or in to which they run.

The shovel company contends that even if its mortgage was not properly recorded having taken possession of the property before the adjudication of bankruptcy its title became absolute as against the trustee. That is not the law. The petition in bankruptcy was filed December 30, 1912, and possession of property was taken March 6, 1913. The title of the trustee dates from the time of the filing of the petition in bankruptcy. State Bank v. Cox, 16 A. B. R. 32 (C. C. A. Seventh Circuit); In re Waite-Robbins Motor Co., 27 A. B. R. 541; in re Judson, 27 A. B. R. 704 affirmed by U. S. Supreme Court April 1913; 30 A. B. R. 1 (advance sheets July 1913) Acme Harvester Co. v. Beekman Lumber Co., 27 A. B. R. 262 (U. S. Supreme Court); Toof v. City National Bank, 30 A. B. R. 79 (advance sheets July 1913).

Since the amendment of 1910 the trustee may challenge any security or conveyance that a lien creditor or a judgment creditor might challenge had bankruptcy not intervened. Loveland on Bankruptcy Vol. 1 pg. 768 (4th ed.) In re Hammond 26 A. B. R. 336; In re Bazemore 26 A. B. R. 494; In re Franklin Lumber Co. 26 A. B. R. 37; In re Gehris-Herbnie Co. 26 A. B. R. 470; Matter of Stern & Levi 26 A. B. R. 535; In re Smith 29 A. B. R. 527. In re Harrington 29 A. B. R. 690; In re Mervy 29 A. B. R. 829; In Re Farmers Supply Co. 28 A. B. R. 535; In re Williamsburg Knitting Mill Company 27 A. B. R. 178 Affirmed by U. S. C. C. A. Fourth Circuit 27 A. B. R. 578; In re Calhoun Supply Co. 26 A. B. R. 528.

In view of the foregoing I am of the opinion that the motion to dissolve the injunction should be denied and an order entered directing the Fairbanks Steam Shovel Company to deliver the property in question to the trustee in bankruptcy.

I herewith transmit transcript of evidence and briefs filed by counsel.

Respectfully submitted,

E. S. Robinson,
Referee in Bankruptcy.

Indorsed, Report of Referee on Motion of Fairbanks Shovel Company to dissolve injunction. Filed Aug. 6, 1913, at 11-20 o'clock A. M. R. C. Brown, Clerk.

Order or decree Aug. 21, 1913.

8 And afterwards, to wit: on the 21st day of August, A. D. 1913, the following further proceedings were had in said Court in said matter, and were entered of record to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

In the Matter of Federal Contracting Company Bankrupt } In Bankruptcy No. 2238

The above entitled matter coming on to be heard upon certificate of Review from the report of E. S. Robinson, Referee and the Court having considered the record and evidence in the case, and the reports of the referee, and the objections and exceptions filed to said reports and the arguments of counsel thereon, and being fully advised in the premises, it is

Ordered that the objections and exceptions to the reports of the Referee be overruled and denied and that the reports of the Referee be approved and confirmed.

HUMPHREY, *J.*

(Seal)

A True Copy.

Attest:

R. C. BROWN,
Clerk.

Indorsed Filed August 21st, 1913, at 10:30 o'clock A. M. R. C. Brown, Clerk.

10 And afterwards, to wit: on the 30th day of August A. D. 1913, there was filed in the office of the Clerk of this Court a certain petition for the allowance of an appeal, which said petition was and is in the words and figures, following, to wit:

11 In the District Court of the United States

For the Southern District of Illinois

Southern Division.

In the Matter of Federal Contracting Company, Bankrupt } In Bankruptcy.

Federal Contracting Company, *Petitioner*
vs.
The Fairbanks Steam Shovel Company *Defendant.* } Injunction

And now comes The Fairbanks Steam Shovel Company, defendant in the above petition, and petitions the Honorable J. Otis Humphrey, Presiding Judge of said court, to grant it an appeal from the decree entered by the said court in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Circuit, as the law provides, upon the filing of such bond and upon such terms as the court may require.

And your petitioner files herewith an assignment of errors as required by the rules of said Circuit Court of Appeals.

The Fairbanks Steam Shovel Company,
By John A. Bellatti,
Its Attorney.

Indorsed, Petition by the Fairbanks Steam Shovel Company for an Appeal. Filed Aug. 30, 1913, at 10 o'clock A. M. R. C. Brown, Clerk.

12 And afterwards, to wit: on the 30th day of August A. D. 1913, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors was and is in the words and figures, following, to wit:

ment of
filed
10, 1913.

13 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

In the Matter of
Federal Contracting
Company, Bankrupt } In Bankruptcy

Federal Contracting Company,
Petitioner
vs.
The Fairbanks Steam Shovel Company
Defendant } Injunction

And The Fairbanks Steam Shovel Company, defendant in the above petition, respectfully represents that the decree in the above entitled cause entered by the said District Court is erroneous and for errors assigns the following:

First: The District Court erred in overruling the objections and exceptions of The Fairbanks Steam Shovel Company to the report of E. S. Robinson, Referee in Bankruptcy, to whom this cause was referred to take the proof and report the same together with his conclusions.

Second: The said District Court erred in approving and confirming the report of the said E. S. Robinson, Referee in Bankruptcy wherein he finds that the residence of the Federal Contracting Company was in Cook County, in the State of Illinois, at the time the said Federal Contracting Company executed the mortgage in evidence to The Fairbanks Steam Shovel Company and in refusing to find the residence of
14 the Federal Contracting Company at the time it executed said mortgage was Beardstown, in the County of Cass and State of Illinois.

Third: The said District Court erred in approving and confirming the report of the said E. S. Robinson, Referee, etc., wherein he finds the title of The Fairbanks Steam Shovel Company to the dredge mortgaged by the mortgage in evidence to The Fairbanks Steam Shovel Company did not become absolute as against the Trustee in Bankruptcy by tak-

ing possession of the said mortgaged dredge on March 6, 1913, by the said mortgagee in said mortgage and in refusing to find and hold that by taking possession of the dredge under its mortgage prior to the adjudication in bankruptcy, The Fairbanks Steam Shovel Company perfected its title to the dredge in question and has a right to hold the same as against the trustee in bankruptcy.

Fourth: The said District Court erred in ordering and decreeing that the temporary injunction heretofore issued by said District Court be made perpetual.

Fifth: The said District Court erred in decreeing that the mortgaged dredge in question be surrendered by The Fairbanks Steam Shovel Company to the trustee in bankruptcy of the Estate of the Federal Contracting Company.

Sixth: The said District Court erred in refusing to find and hold that as to The Fairbanks Steam Shovel Company the residence of the Federal Contracting Company at the time of the execution of the mortgage in controversy under the law of the State of Illinois as to chattel mortgage was in Beardstown, in the County of Cass and State of Illinois.

Seventh: The said District Court erred in refusing to order and decree that the temporary injunction heretofore issued in this cause by the said court should be dissolved.

Eighth: The said District Court erred in refusing to
15 enter decree, dismissing the petition of the Federal Contracting Company against The Fairbanks Steam Shovel Company for an injunction in this cause.

JOHN A. BELLATTI,
Attorney for The Fairbanks Steam Shovel Company.

Indorsed, Assignment of Errors made by The Fairbanks Steam Shovel Company. Filed Aug. 30, 1913, at 10 o'clock A. M. R. C. Brown, Clerk.

16 And afterwards, to wit: on the 30th day of August A. D. 1913, the following further proceedings were had in said Court in said matter and were entered of record to wit:

of Aug. 1913. 17 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

In the Matter of
Federal Contracting
Co Bankrupt. } In Bankruptcy

Federal Contracting Company,
Petitioner
vs.
The Fairbanks Steam Shovel Company,
Defendant } Injunction

ORDER ALLOWING APPEAL AND FIXING BOND

And The Fairbanks Steam Shovel Company comes and files its petition in this cause praying for an appeal to the United States Circuit Court of Appeals for the Seventh Circuit and the appeal is allowed and granted upon The Fairbanks Steam Shovel Company filing bond with the clerk of this court in the sum of $5,000, conditioned as the law requires with J. G. Fairbanks as security.

Enter.

HUMPHREY,
Judge.

Springfield, Illinois, August 30th, 1913.

Indorsed, Order allowing Appeal and fixing Bond, Ent. August 30th, 1913, at 10 o'clock A. M. R. C. Brown, Clerk.

18 And afterwards, to wit: on the 12th day of September A. D. 1913, there was filed in the office of the Clerk of this Court a Certain Appeal Bond, which said Appeal Bond was and is in the words and figures, following, to wit:

Appe
filed
191

19 Know All Men By These Presents: That we, The Fairbanks Steam Shovel Company, a corporation, organized under the laws of the State of Ohio, with its principal place of business at Marion, in said state, as principal, and J. G. Fairbanks, as surety, are held and firmly bound unto William V. Wills, Trustee of the Estate of Federal Contracting Company, Bankrupt, in the sum of Five Thousand Dollars, lawful money of the United States, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, firmly by these presents.

Sealed with our seals and dated this 4th day of September, A. D. 1913.

Whereas, lately, to wit, on the 21st day of August, A. D. 1913, at a session of the District Court of the United States for the Southern District of Illinois, Southern Division, in a suit pending in said court, wherein the said William V. Wills, Trustee of the Estate of Federal Contracting Company, Bankrupt, was complainant, and The Fairbanks Steam Shovel Company was defendant, an order or decree was rendered against the said defendant, and the said defendant, The Fairbanks Steam Shovel Company having obtained from said court an order, allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the order or decree in the aforesaid suit, and a citation directed to the said William V. Wills, Trustee of the Estate of Federal Contracting Company, Bankrupt, is to be issued, citing and admonishing him to be and appear at the Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, Illinois, within thirty days from the date hereof;

Now the condition of the above obligation is such that
25 if the said The Fairbanks Steam Shovel Company shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make good its appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

THE FAIRBANKS STEAM SHOVEL COMPANY,
By C. W. FISHER,
Its President.

(Seal)

Attest:
WILLIAM E. SCOFIELD,
Its Secretary.

JAMES G. FAIRBANKS (Seal)

Bond, Sept. 12.

State of Ohio } ss.
County of Marion }

I, C. W. Fairbanks, a Notary Public, in and for said county, in the state aforesaid, do hereby certify that C. W. Fisher, President, and William E. Scofield, Secretary, of The Fairbanks Steam Shovel Company, a corporation, personally known to me to be the same persons and respective officers of The Fairbanks Steam Shovel Company, a corporation, whose names are subscribed as such officers to the foregoing instrument, appeared before me this day in person, and acknowledged that as such officers they signed, sealed and delivered the foregoing instrument on behalf of said corporation, as its free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 8th day of September, A. D. 1913.

C. W. Fairbanks,
Notary Public.

(Seal)

21 State of Ohio } ss.
County of Marion }

I, C. W. Fairbanks, a Notary Public, in and for said county, in the state aforesaid, do hereby certify that J. G. Fairbanks, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the foregoing instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 8th day of September, A. D. 1913.

C. W. Fairbanks.
Notary Public.

(Seal)

Approved this 12th day of September A. D. 1913,

J. O. Humphrey,
J.

Indorsed, Appeal Bond, Filed Sept. 12, 1913, at 10 o'clock A. M. R. C. Brown, Clerk.

34 And afterwards, to wit: on the 15th day of September A. D. 1913, there was filed in the office of the Clerk of this Court a certain Praecipe for Record, which said Praecipe for Record was and is in the words and figures, following, to wit:

35 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

In the Matter of Federal Contracting Company, Bankrupt.

Federal Contracting Company, *Petitioner*
vs.
The Fairbanks Steam Shovel Company *Defendant.*
} Petition for Injunction.

To the Honorable R. C. Brown, Clerk of said court.

You will please make up the record in the above entitled cause in appeal to the United States Circuit Court of Appeals for the Seventh Circuit, incorporating the following.

1. The agreed statement under rule 77 of the Rules of Practice in Equity filed herein.
2. The report of E. S. Robinson, Referee, etc., filed herein on August 6, 1913, omitting all the testimony reported.
3. The final order and decree of the District Court in this cause and entered and filed herein on August 21, 1913.
4. The petition of The Fairbanks Steam Shovel Company for appeal and the order allowing the appeal and fixing and approving the appeal bond filed herein on August 30, 1913.
5. The assignment of errors filed herein on August 30, 1913.

36 6. The appeal bond filed in this cause.
7. Citation and service.

JOHN A. BELLATTI,
WALTER BELLATTI,
Attorneys for The Fairbanks Steam Shovel Company, Appellant.

for
filed
, 1913.

Service of the above praecipe for record and receipt of copy thereof acknowledged this 8th day of September, A. D. 1913. The praecipe is satisfactory and no other part of the record need be incorporated in the transcript on account of the trustee.

ELBERT C. FERGUSON,
JOHN C. BURCHARD,
WILLIAM MUMFORD,
Attorneys for William V. Wills Trustee in Bankruptcy of the Estate of Federal Contracting Company, Bankrupt.

Indorsed, Praecipe for Record on Appeal, Filed Sep. 15, 1913, at 9 o'clock A. M. R. C. Brown, Clerk.

e of 39 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois

Southern Division.

United States of America, }
Southern District of Illinois, } ss.

I, R. C. Brown, Clerk of the District Court of the United States, for the said Southern District of Illinois, keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of the proceedings had of record in said Court made in accordance with Praecipe filed in the matter of the Federal Contracting Company, bankrupt, as the same appears from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court, at my office, in the City of Springfield, in said District, this 15th day of September, A. D. 1913.

R. C. BROWN,
Clerk.

(Seal)

26 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 25, inclusive, contain a true copy of the printed record, printed under my supervision and filed September 20, 1913, on which this cause was argued, heard and determined, in the case of In the Matter of Federal Contracting Company, Bankrupt. The Fairbanks Steam Shovel Company vs. William V. Wills, Trustee in Bankruptcy of the Estate of Federal Contracting Company, No. 2017, October Term, 1912, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-sixth day of February A. D. 1914.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

27 At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court-room, in the city of Chicago, in said seventh circuit, on the first day of October, 1912, of the October term, in the year of our Lord one thousand nine hundred and twelve, and of our independence the one hundred and thirty-seventh year.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States court-room, in the city of Chicago, in said seventh circuit, on the seventh day of October, 1913, of the October term, in the year of our Lord one thousand nine hundred and thirteen, and of our independence the one hundred and thirty-eighth year.

And afterwards, to-wit: On the seventh day of October, 1913, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, *October* 7, 1913.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2047.

In the Matter of FEDERAL CONTRACTING CO., Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY
vs.
WILLIAM V. WILLS, Trustee, etc.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on November 13, 1913.

28 And afterwards, to-wit: On the thirteenth day of November, 1913, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, *November* 13, 1913.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:
Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. William H. Seaman, Circuit Judge.
Hon. Christian C. Kohlsaat, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2047.

In the Matter of FEDERAL CONTRACTING CO., Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY
vs.
WILLIAM V. WILLS, Trustee, etc.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. John A. Bellatti, counsel for appellant, and by Mr. John C. Burchard, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the second day of December, 1913, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Rehearing, which said Petition for Rehearing is not copied here nor made a part of this record.

And afterwards, to-wit: On the fourteenth day of January, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court which is in the words and figures following, to-wit:

29 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1913.

2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Before Baker, Seaman, and Kohlsaat, Circuit Judges.

From the agreed statement of facts it appears that on March 25, 1913, Federal Contracting Company, hereinafter termed the bankrupt, was adjudicated a bankrupt in the District Court of the United States for the Southern District of Illinois, Southern Division, upon petition filed December 30, 1912. Prior to such adjudication, and on September 6, 1907, the bankrupt gave a written order to appellant for one two-yard dredge complete, describing the machinery in detail, to be delivered at Beardstown, Illinois,—price $10,500, for which sum the bankrupt agreed to give its notes and, at the time and place of delivery, "to give in security of said notes a first mortgage on the above-named machinery," and further agreed in writing that "the title to the goods above ordered shall not pass until paid for in cash or until notes given for the same are fully paid and discharged, but shall rest only in you and the property
30 shall be yours until that time." The order was accepted, the dredge delivered and the notes and a chattel mortgage securing the same given to appellant as agreed. The mortgage was acknowledged and recorded in Cass County, Illinois. The notes not having been paid at maturity, new notes aggregating $12,215.30 were on June 8, 1912, executed and delivered to appellant by the bankrupt for the balance due, and some additional indebtedness for repairs furnished, and a new chattel mortgage was also executed and delivered upon the dredge by the bankrupt to secure the new notes, which mortgage was acknowledged and recorded in Cass County aforesaid. On March 6, 1913, the bankrupt having defaulted in the payment of said notes, the appellant took possession of the said dredge and advertised it for sale pursuant to the terms of the chattel mortgage and the statutes of Illinois, appellant not being at that time advised of the bankruptcy proceedings. The

amount then due upon said notes was the sum of $11,215.30 and accrued interest.

On March 28, 1913, the bankrupt filed its petition in said District Court setting up that appellant had taken possession of said dredge under and by virtue of said chattel mortgage and had advertised the same for sale as in said chattel mortgage provided, and alleging further that said chattel mortgage was invalid as against the rights of the trustee to be thereafter appointed, that unless such sale were restrained the dredge would be sold at a sacrifice and that the said sale should be enjoined. Thereupon the court entered a temporary restraining order. Appellant, without questioning the jurisdiction of the court, appeared and in its answer alleged that the chattel mortgage was valid, and admitted that it had taken and still had possession of the dredge under the chattel mortgage provisions. It further answered that it had thereby perfected its title thereto prior to the adjudication in bankruptcy and asked that the injunction be dissolved. On April 18, 1913, no trustee having yet been appointed, it was ordered by the court, on the stipulation of the parties, that the sale might proceed and that if appellant bought in the dredge it should hold it subject to the right of the trustee to take possession thereof, should the cause be decided adversely to appellant. The trustee was appointed on April 22, 1913, and substituted for said bankrupt in said cause. Appellant purchased the dredge at the sale. Thereupon the cause was referred to the referee in bankruptcy as a special master to take proofs and report the same and his conclusions as to the law to the court. He
31 thereafter made report finding that the chattel mortgage was void as to the trustee for the reason that it was not acknowledged and recorded in Cook County, Illinois, the residence of the bankrupt, that the title of the trustee attached to the dredge as of the date of filing the petition in bankruptcy and was not affected by appellant's taking possession after that date. The special master thereupon recommended that the motion to dissolve the injunction be denied and that an order be entered directing the appellant to surrender the dredge to the trustee. Appellant thereupon filed its exceptions to the report and prayed for a review and revision by the District Court. That court overruled the exceptions and approved the special master's report, from which order this appeal was taken.

The errors assigned are, (1) that the court found that the residence of the bankrupt was in Cook County, Illinois; (2) that the court found that the title of the trustee attached as of the date of filing the petition in bankruptcy and was prior to that of appellant; (3) that the court refused to dissolve the injunction and made the same perpetual. Other facts appear in the opinion.

KOHLSAAT, *Circuit Judge*, delivered the opinion of the court.

On the hearing of the appeal herein, appellant orally urged upon the court the question of the right of the trustee to bring and maintain this cause in the District Court, for the reasons:

1st. That the District Court had no jurisdiction over the subject-

matter of this suit under the decision of the Supreme Court in Harris v. First National Bank, 216 U. S. 382. With regard to this objection, it suffices to say that appellant's answer to the merits and its acts in contesting the merits during the pendency of the suit amount, beyond question, to a consent to such jurisdiction. Whether under clauses 23*a* and 23*b*, construed together with clause 70*e* as amended in 1903, consent to jurisdiction of the District Court is required, need not therefore be considered.

2nd. That the District Court, by its finding in the present suit that the bankrupt's principal office and principal place of business under the Illinois corporation and recording statutes was in the Northern District of Illinois, in legal effect found that the District Court of the Southern District of Illinois, sitting in bankruptcy, had no jurisdiction under the National bankruptcy statute
32 to make the adjudication and appoint the trustee. This present cause is an independent and plenary suit by the trustee (who adopted the bill of complaint filed by the bankrupt in anticipation of the appointment of the trustee) professing to act in the right of the bankrupt mortgagor and its general creditors against appellant as mortgagee to recover possession of property taken by appellant under an alleged invalid mortgage. This suit might therefore have been brought as well in a State court. But wherever brought, if appellant desired to challenge the right of the trustee to sue as representative of the bankrupt and its general creditors, appellant should have raised the issue in this suit by a proper plea. Appellant's answer to the merits of the question of title and right of possession of the property was an admission of the trustee's capacity to sue. 31 Cyc. 171-2. If appellant had filed such a plea, it would then, and only then, have become necessary to consider (with the bankruptcy record introduced into this cause as evidence, and if the bankruptcy record showed the question in a way to be determined collaterally) whether principal office and principal place of business inevitably have identical meanings under the Illinois corporation and recording statutes and under the National bankruptcy act. As the record stands, appellant will not be heard to question the right of the trustee to maintain the present suit.

While, upon the merits, other points were made by the trustee, the special master properly held that the only one necessary to be considered was whether the chattel mortgage was acknowledged and recorded according to the statutes of Illinois. Unless it was, the rights of the trustee would intervene as of the date of filing of the petition in bankruptcy and would not be affected by the subsequent act of the mortgagee in taking possession. Mueller v. Nugent, 184 U. S. 1; In re Rodgers, 125 Fed. 169, decided by this court; sec. 70 of Bankruptcy act as amended June 25, 1910, supp. of 1911, U. S. Comp. Stat. of 1901, p. 1511; Everett v. Judson, 30 A. B. R. p. 1, decided by United States Supreme Court April, 1913; Toof v. City Nat'l Bank, 30 A. B. R. 79, decided by United States Cir. Ct. of Appeals June, 1913; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300.

Section 2 of chapter 95 of mortgages of the statutes of Illinois provides that chattel mortgages in counties having over 200,000 population, if the mortgagee is a resident of the state at the time, must be acknowledged before officers therein enumerated,
33 in the town, precinct, district or county wherein the mortgagor resides. The articles of incorporation of the bankrupt stated that the location of bankrupt's principal office was "in the city of Chicago, in the County of Cook and State of Illinois," and the commissioners in their report to the secretary of state set out "that the post office address of the business office of said company is at number — Park Hotel * * * in the city of Beardstown in the county of Cass and State of Illinois." The special master found that he charter was filed for record and recorded in Cass County, Illinois; that all but two of the stockholders' and directors' meetings were held at Beardstown, and that after a short time no office was maintained in Chicago, but that the bankrupt did maintain an office at Beardstown, where it kept its records, books, etc.; that its stationery carried the address of Beardstown and that the address was given in its reports to the secretary of state and collector of internal revenue as the location of its principal office, and that for all practical purposes the principal office was at Beardstown when the mortgage was given in June, 1912. Upon this state of facts the special master found, as above stated, that the bankrupt's residence was at Chicago, Illinois.

This finding of the special master is in accord with the weight of authority. By section 50 of the Illinois corporation act, it is provided that whenever the board of directors, managers or trustees of any corporation hereafter organized by virtue of any law of this State may desire to change * * * the place of business * * * they may call a special meeting of the stockholders of such corporation * * * for the purpose of submitting to a vote of such stockholders * * * the question of such change of place of business. Section 51 prescribes the notice—not less than 30 days, and the manner in which it shall be given, while section 52 provides that such change must be effected by a two-thirds vote of all the stock of the corporation. Section 53 provides that when such change is voted, a certificate thereof, verified by the affidavit of the president and under the seal of said corporation shall be filed in the office of the secretary of state and recorded in the county where the principal business of such corporation is located, whereupon the change as to the place of business, etc., shall become effective. Section 54 requires publication of such change to be made in a newspaper published in or nearest the county in which the principal office is located.

Here no attempt was made to comply with the statute in the above respect.

34 While section 2 of the corporation act uses the language, "the location of the principal office," and the language of section 50 of said act is to change the "place of business," we are of the opinion that the two are synonymous as used in the statute. It has been held that the domicil of a corporation is that place

where its principal office is located. Every corporation has a residence within the meaning of the word as used in the practice act, where its principal office or place of business is established. Jenkins v. California Stage Co., 22 Cal. 537.

In Connecticut, etc., R. R. Co. v. Cooper, 30 Vt. 476, it is said "where a corporation is not located by the terms of its charter, its residence and location are regarded as being in the place where it keeps its principal office and does its corporate business."

It was held in Western Transportation Co. v. Scheu, 19 N. Y. 408, that a corporation had its domicil for the purpose of taxation in the city or town in which the principal office for managing the affairs of the company was located, as evidenced by its charter.

The Supreme Court of the United States said, in Galveston, etc., Ry. Co. v. Gonzales, 151 U. S. 504, that the question of inhabitancy of a corporation must be determined, not by the residence of any particular officer, but by the location of the principal offices—where its books are kept and its corporate business is transacted, even though it may transact its most important business elsewhere; citing Conn. etc. R. R. Co. v. Cooper, supra.

In Ex parte Shallenberger, 96 U. S. 377, the court decided that a corporation can have its legal home only at the place where it is located by or under the authority of its charter.

It was early decided in Illinois that "the residence of a corporation, if it can be said to have a residence, is necessarily where it exercises corporate functions. It dwells in the place where its business is done. It is located where its franchises are exercised * * *. It has voluntarily established its residence in Cook County. It has there located its chief business office." Bristol v. C. & A. R. R. Co., 15 Ill. 436.

A chattel mortgage covering property in Chenoa, Illinois, was held to have been properly acknowledged in St. Louis, Missouri, that being the home office of the company. Hewitt v. General Electric Co., 164 Ill. 377.

A statement in a certificate of incorporation as to the location of the corporation's principal place of business is conclusive on
35 the corporation. People v. Barker, 39 N. Y. Supp. 88.

The general act under which a corporation was organized granted the power to "change the location of its principal office." Held, that the term "principal office" was intended to include "principal place of business," and such a change of the place of business to another city in the state was authorized. Bernstein v. Kaplan, 43 So. 581; C. D. & V. R. R. Co. v. Bank of North America, 82 Ill. 493-496, citing Bristol v. Chicago & Aurora R. R. Co., 15 Ill. 436. See also First National Bank v. Wilcox, 131 Pacific (Washington), 203; Clark & Marshall's Private Corporations, p. 363; Secs. 464 and 496 Thompson on Corporations (2nd edition).

In Crofut v. Brooklyn Ferry Co., 36 Barber, 201, it is said that the certificate of incorporation of a company, together with its acts in the exercise of its franchise, show where it is established. The place where its books are kept, where the office of its attorney is,

where its directors meet or where it is assessed for personal property, are not proof conclusive of the locus of its establishment.

The court was right in approving the report of the special master and holding that the residence of the bankrupt was at Chicago, that therefore the chattel mortgage in suit, having never been properly acknowledged, was invalid as against the trustee of the bankrupt, and in refusing to dismiss the temporary injunction and ordering the dredge to be turned over to the trustee. The decree of the District Court is, therefore,

Affirmed.

A true Copy.
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

36 And afterwards, on the same day, to-wit: On the fourteenth day of January, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, *January* 14, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY
vs.
WILLIAM V. WILLS, Trustee, etc.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order or decree of the said District Court in this cause appealed from be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the twenty-third day of January, 1914, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

37 FRIDAY, *January* 23, 1914.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Christian C. Kohlsaat, Circuit Judge.
Hon. Julian W. Mack, Circuit Judge.
Edward M. Holloway, Clerk.
Luman T. Hoy, Marshal.

2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY
vs.
WILLIAM V. WILLS, Trustee, etc.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the Court that the Petition for Rehearing heretofore filed in this cause on December 2nd, 1913, be re-filed, and upon consideration whereof, it is now here ordered that the said Petition for Rehearing be, and the same is hereby overruled.

And afterwards, to-wit: On the seventeenth day of February, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Appeal, which is in the words and figures following, to-wit:

38 In the United States Circuit Court of Appeals, Seventh Circuit.

No. 2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Petition for Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States.

The above mentioned appellant, The Fairbanks Steam Shovel Company, respectfully shows that the above entitled cause is now

pending in the United States Circuit Court of Appeals for the Seventh Circuit, and that a judgment has therein been rendered on the 14th day of January A. D. 1914, affirming the decree of the Circuit Court of the United States for the Southern District of Illinois, and that the matter in controversy in said suit exceeds five thousand dollars besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Seventh Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said Appellant prays that an appeal be allowed it in the above entitled cause directing the clerk of the United
39 States Circuit Court of Appeals for the Seventh Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

ELISHA B. DURFEE,
Solicitor for Appellant.

JOHN A. BELLATTI,
WALTER BELLATTI,
GEORGE B. SCOFIELD,
Of Counsel.

Endorsed: Filed Feb. 17, 1914. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the seventeenth day of February, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Seventh Circuit.

No. 2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

40 *Assignment of Errors.*

And The Fairbanks Steam Shovel Company, Appellant herein, feeling itself aggrieved, respectfully represents that the judgment and decree in the above entitled cause on appeal affirming the judg-

ment and decree of the court below, entered by the United States Circuit Court of Appeals for the Seventh Circuit, is manifestly erroneous and prejudicial to said appellant and in connection with its petition for appeal herein, for errors assigns the following, that is to say, the said United States Circuit Court of Appeals erred in the particulars, to-wit:

First. The said United States Circuit Court of Appeals erred in holding that answer to the merits o. the question of title and right of possession of the property in the absence of a plea was an admission of trustee's capacity to sue, under the rules of Practice for the Courts of Equity of the United States promulgated Nov. 4, 1912, and also that that settled the question of right and title to the property and precluded the appellant from showing and precluded the court from seeing what appeared on the face of the record, that the taking possession by appellant under its mortgage and under its contract retaining in itself the title to the property until paid for in full in cash, perfected its title thereto, notwithstanding the other facts that appeared on the face of the record, that the involuntary petition in bankruptcy was filed in the wrong court and district and without the district where the alleged bankrupt had its principal place of business, resided and had its domicile, and in a court without territorial jurisdiction and without jurisdiction of the subject matter and that consequently no petition in bankruptcy was ever filed.

Second. The said court erred in holding that any title of the plaintiff or the trustee attached to the property in question as of the date of such filing of the petition in bankruptcy in the wrong court and district or of any other date, and also erred in holding that capacity to sue was loaded like a wooden horse with capacity

41 and right and title to recover.

Third. The said court erred in holding that the voidness of the plaintiff's and the trustee's right and title to the property and the perfection of appellant's right and title thereto, did not appear on the face of the record in the statement of facts under Rule 77, of the Rules of Practice for Courts in Equity, and by the report of the Referee as Special Master and in the judgment and decree of the court below of which that report was made a part by confirmation.

Fourth. The said court erred in holding that the court below was a court that would have had concurrent jurisdiction in the case with any state court, if bankruptcy had not intervened.

Fifth. The said court erred in holding that the alleged bankrupt resided in the Northern District of Illinois for purposes of recording and in the Southern District of Illinois for purposes of adjudication in bankruptcy and for the purposes of the proceeding below and that the contrary did not appear on the face of the record.

Sixth. The said court erred in holding that the title to the property which it was agreed should not pass and never did pass to alleged bankrupt, did pass to the alleged trustee in bankruptcy by the filing of the involuntary petition in bankruptcy in the wrong court and district.

Seventh. The said court erred in holding that a preference was ever given to appellant at any time.

Eighth. The said court erred in refusal to hold that the court below was the bankruptcy court that made the adjudication of bankruptcy in question and was without jurisdiction of the cause in bankruptcy and that the proceeding below was a proceeding in the court of bankruptcy sitting in bankruptcy that made the adjudication and in the cause in which the alleged bankrupt was ad-
42 judged bankrupt and as part of the cause, and in not reversing the judgment and decree below.

Ninth. The said court erred in refusal to hold that it did appear on the face of the record of proceedings below that the court of bankruptcy was without jurisdiction and that the alleged trustee in bankruptcy acquired no title to the property.

Tenth. The said court erred in holding that the alleged bankrupt was of the kind of corporation that could be adjudged bankrupt.

Eleventh. The said court erred in not reversing the judgment below and dissolving the injunction because the plaintiff had a plain, complete and adequate remedy at law by action to recover the specific personal property.

Twelfth. The said court erred in affirming and not reversing the judgment and decree of the court below and in not of its own motion dismissing the cause in bankruptcy below and reversing the decree against appellant.

Thirteenth. The said court erred in holding that the residence of alleged bankrupt was not at the time of executing the chattel mortgage in question at Beardstown, in the county of Cass and State of Illinois.

Fourteenth. The said court erred in not holding that at the time of the filing of involuntary petition in bankruptcy against said alleged bankrupt and for six months prior thereto, it had its principal place of business, resided and had its domicile in Cook County, Illinois.

Wherefore the appellant prays that said judgment and decree may be reversed and that appellant may have an adjudication and decree in its favor as herein specified.

E. B. DURFEE,
Solicitor for Appellant.

JOHN A. BELLATTI,
WALTER BELLATTI,
GEORGE B. SCOFIELD,
Of Counsel.

Endorsed: Filed Feb. 17, 1914. Edward M. Holloway, Clerk.

43 And afterwards, to-wit: On the twenty-sixth day of February, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court the Order allowing the Appeal, which said Order is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Seventh Circuit.

No. 2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Order Allowing Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

Feb'y 23, 1914.

WILLIAM R. DAY,
Justice of the Supreme Court of the United States.

Endorsed: Filed Feb. 26, 1914. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twenty-sixth day of February, 1914, in the October Term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond on Appeal, which is in the words and figures following, to-wit:

44 In the United States Circuit Court of Appeals, Seventh Circuit.

No. 2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Bond on Appeal from Decree of the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States.

Know all Men By These Presents: That we, the Fairbanks Steam Shovel Company, a corporation, organized under the laws of the State of Ohio, with its principal place of business at Marion, in said State, as principal, and J. G. Fairbanks, and —— ——, —— ——, as sureties are held and firmly bound unto William V. Wills, Trustee of the estate of Federal Contracting Company, Bankrupt,

in the sum of Five Thousand Dollars, lawful money of the United States, to the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and successors, firmly by these presents.

Sealed with our seals and dated this — day of ——, A. D. 1914.

Whereas the appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Seventh Circuit, on the — day of ——.

Now, therefore, the condition of this obligation is such that if the said appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full
45 force and virtue.

[SEAL.] THE FAIRBANKS STEAM SHOVEL COMPANY.
By J. G. FAIRBANKS, *Pres.*

Attest:
A. STOLTZ, *Sec'y.*

J. G. FAIRBANKS.
[SEAL.] ILLINOIS SURETY COMPANY,
By SCOFIELD & DURFEE, *Its Agents.*

STATE OF OHIO,
Marion County, ss:

J. G. Fairbanks and —— ——, sureties named in the foregoing bond, being first duly sworn, each for himself says:

That he is a resident and free holder in the county of Marion, State of Ohio, and is worth the sum of Twenty thousand Dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. G. FAIRBANKS.

Subscribed and sworn to before me this 16th day of February, A. D. 1914.

[SEAL.] H. O. CRAWBAUGH,
Notary Public in and for the County of Marion and State of Ohio.

The foregoing bond is approved this 23d day of February, A. D. 1914.

WILLIAM R. DAY,
Justice of the Supreme Court of the United States.

Endorsed: Filed Feb. 26, 1914. Edward M. Holloway, Clerk.

46 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 19,

inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel, Petition for Rehearing and Proof of service of same) in the case of In the Matter of Federal Contracting Company, Bankrupt. The Fairbanks Steam Shovel Company vs. William V. Wills, Trustee in Bankruptcy of the Estate of Federal Contracting Company, No. 2047, October Term, 1912, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-sixth day of February, A. D. 1914.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

47 In the United States Circuit Court of Appeals, Seventh Circuit.

No. 2047.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Citation to Appellees on Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States.

The United States Circuit Court of Appeals, Seventh Circuit.

THE UNITED STATES OF AMERICA,
Seventh Circuit:

The President of the United States to William V. Wills, Trustee in bankruptcy of Federal Contracting Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Seventh circuit, wherein The Fairbanks Steam Shovel Company, is appel-
48 lant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William R. Day, Justice of the Supreme Court of the United States, this 23 day of February, A. D. 1914.

WILLIAM R. DAY,
Justice of the Supreme Court of the United States.

Service of the foregoing citation and receipt of copy thereof admitted this 26th day of February, A. D. 1914.

ELBERT C. FERGUSON,
WILLIAM MUMFORD,
JOHN C. BURCHARD,
Attorneys for William V. Wills, Trustee of the Estate of Federal Contracting Company, Appellee.

49 [Endorsed:] No. 2047. In the United States Circuit Court of Appeals, Seventh Circuit. In the Matter of Federal Contracting Company, Bankrupt. The Fairbanks Steam Shovel Co., Appellant, vs. William V. Wills, Trustee in Bankruptcy of the estate of Federal Contracting Company, Appellee. Citation to Appellee on Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States. Filed Feb. 26, 1914. Edward M. Holloway, clerk.

50 In the Supreme Court of the United States.

No. —.

In the Matter of Federal Contracting Company, Bankrupt.

The Fairbanks Steam Shovel Company, Appellant,
vs.
William V. Wills, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Affidavit of Amount in Controversy.

James G. Fairbanks, being first duly sworn says that he is the president of said Appellant, The Fairbanks Steam Shovel Company and has been connected with it in an official capacity for over fifteen years last past, that he is acquainted with the dredge in controversy and knows its value and that its value is over Five thousand Dollars and always has been since it was made by appellant and delivered in the year 1907, at Beardstown in the County of Cass, and State of Illinois, and that the amount involved and in controversy below and in this court on appeal is over said sum of Five thousand Dollars, exclusive of interest and costs, and further affiant saith not.

JAMES G. FAIRBANKS.

State of Ohio,
Marion County, ss:

Subscribed and sworn to by the said James G. Fairbanks, before me this 26th day of February, A. D. 1914.

[Notarial Seal, Marion County, Ohio.]

H. O. CRAWBAUGH,
Notary Public in and for said Marion Co., Ohio.

51 [Endorsed:] No. —. In the Supreme Court of the United States. In the Matter of Federal Contracting Company, Bankrupt. The Fairbanks Steam Shovel Co., Appellant, vs. William V. Wills, Trustee in Bankruptcy of the estate of Federal Contracting Company, Appellee. Affidavit of amount in controversy.

52 In the Supreme Court of the United States.

No. —.

In the Matter of FEDERAL CONTRACTING COMPANY, Bankrupt.

THE FAIRBANKS STEAM SHOVEL COMPANY, Appellant,
vs.
WILLIAM V. WILLS, Trustee in Bankruptcy of the Estate of Federal Contracting Company, Appellee.

Stipulation on Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States.

It is hereby stipulated that the amount in controversy in this case is over five thousand dollars, exclusive of interest and costs.

ELISHA B. DURFEE,
JOHN A. BELLATTI,
WALTER BELLATTI,
GEORGE B. SCOFIELD,
Attorneys for Appellant.
ELBERT C. FERGUSON,
WILLIAM MUMFORD,
JOHN C. BURCHARD,
Attorneys for Appellee.

53 [Endorsed:] No. —. In the Supreme Court of the United States. In the Matter of Federal Contracting Company, Bankrupt. The Fairbanks Steam Shovel Co., Appellant, vs. William V. Wills, Trustee in Bankruptcy of the estate of Federal Contracting Company, Appellee. Stipulation on Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to the Supreme Court of the United States.

Endorsed on cover: File No. 24,077. U. S. Circuit Court Appeals, 7th Circuit. Term No. 926. The Fairbanks Steam Shovel Company, appellant, vs. William V. Wills, trustee in bankruptcy of Federal Contracting Company. Filed March 2d, 1914. File No. 24,077.

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Supreme Court of the United States

No. 37[illegible] 82

THE FAIRBANKS STEAM SHOVEL COMPANY,
APPELLANT,

vs.

WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF FEDERAL CONTRACTING COMPANY,
APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

ELISHA B. DURFEE,
Solicitor for Appellant.

JOHN A. BELLATTI,
WALTER BELLATTI,
GEORGE B. SCOFIELD,
Of Counsel.

F. B. TOOTHAKER, Law Printer, 78-80 N. Third St., Columbus, O.

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IN THE

Supreme Court of the United States

No. 926.

THE FAIRBANKS STEAM SHOVEL COMPANY,
APPELLANT.

vs.

WILLIAM V. WILLS, TRUSTEE IN BANKRUPTCY, OF THE ESTATE OF FEDERAL CONTRACTING COMPANY,
APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which affirmed a decree of the District Court for the Southern District of Illinois, Southern Division, sitting in bankruptcy, which on a petition for an injunction, adjudged that certain specific personal property be turned over to the trustee in bankruptcy.

STATEMENT OF THE CASE.

The appellant, The Fairbanks Steam Shovel Company, received an order from Federal Contracting Company, the alleged bankrupt, for a two yard dredge in September, 1907, at the price of $10,500, which proposed that the title should not pass until paid for in full in cash and until all notes given for it should be paid in cash and that a first mortgage should be given on said dredge to secure the entire purchase price, there being no cash installment to be paid, but all in notes. The dredge was shipped on this order to Beardstown, Illinois, in that year. Instead of a mortgage, a deceptive appearance of a mortgage was given and possession of the dredge surrendered, under a mistake induced by purchaser by misrepresentation as to the place of its residence (if its later contention and the decisions of both courts below are correct on that point). This mortgage, by the law of Illinois, would only be valid, as against *bona fide* purchasers and creditors who gave credit to mortgagor while it was in possession of the dredge, without assuming payment of the mortgage, in case they seized it on execution from the mortgagor, if acknowledged in the county of the residence of the mortgagor, and mortgagor represented to mortgagee, appellant, that Beardstown, in Cass county, Illinois, was the place of its residence (which appellant always believed to be true) and the mortgagor acknowledged this mortgage in Cass county, Illinois, and delivered it to appellant; and for the same debt on the same misrepresentations, acknowledged in the same county, it was renewed once since, on June 8th, 1912, and appellant had both

mortgages recorded there immediately. There was no deliberate agreement or intention to keep them off the records. There was an intention and an attempt to have them recorded. But not being acknowledged in the proper county they could not properly be recorded anywhere. Record, page 13, 31. There was no provision of law in Illinois for recording the conditional sale contract and its recording was not permissible for any purpose. The transaction was the equivalent of the purchase of goods with counterfeit money.

The notes were not paid and appellant took possession of the dredge and proceeded to advertise it for sale. But certain creditors unknown to appellant, filed an involuntary petition in bankruptcy against said Federal Contracting Company in the District Court of the United States in the Southern Division of the Southern District of Illinois, in which Cass county was. After the taking possession, that court after trial, on March 25, 1913, adjudged Federal Contracting Company, bankrupt. Then the alleged bankrupt before the appointment of the trustee filed its petition, on March 26, 1913, in this bankruptcy court and in this bankruptcy cause, entitled therein against appellant, stating that on March 25, 1913, it was adjudicated a bankrupt in said court and that appellant held a mortgage on and had taken possession of the dredge and was about to sell it at a sacrifice under its mortgage and that its mortgage was void, as against the rights of the trustee to be appointed, because the petitioner, mortgagor, resided at the time of the execution of the mortgage, in Chicago, in the county of Cook in the State of Illinois, and that the alleged mortgage was never acknowledged or recorded in said county of Cook, and asked that appellant be enjoined from

selling the dredge. It was not alleged that the claim or debt due to any creditor originated subsequent to the delivery of this dredge to bankrupt, nor that there was any creditor who did not have full knowledge of all the facts of the transaction between Federal Contracting Company and this appellant and of all of appellants rights at all times. The dates of filing the petition in bankruptcy and of taking possession of the dredge by defendant were not pleaded but it was afterwards found that they were December 30, 1912 and March 6, 1913, respectively. A temporary restraining order served was granted without notice or process and appellant moved to dissolve it and filed its answer denying that the residence of the mortgagor was at the time of executing the mortgage in question, in Cook county, Illinois and alleged that it was in Beardstown in Cass county, Illinois. It also alleged the circumstances of the purchase of the dredge and the representations as to the place of residence of the mortgagor which was not denied. The case was referred to the referee in bankruptcy and his report appears on page 11 to 16, printed record. An agreed statement pursuant to rule 77 of the Rules of Practice for Courts in Equity, was filed and appears at pages 2 to 11, printed record.

Exceptions to Report.

It appears by that statement that appellant excepted to the finding of the referee, (1) that the residence of Federal Contracting Company, at the time of making the chattel mortgage was in Cook county, Illinois, and (2) in refusing to find that its residence at that time was in Beardstown, in Cass county, Illinois, also (3) specially excepted to the finding of the referee that by taking possession of the mortgaged dredge appellant did not perfect

its title to the dredge as against the trustee and also (4) excepted to the finding that the title of the trustee dates from the filing of the petition in bankruptcy and (5) specifically excepted to the conclusion of the referee. Record, p. 5.

Heard on Report.

Thereupon the cause was heard by the court on the report and the exceptions, on August 21, 1913, and the court overruled the exceptions and confirmed the report and decided that Federal Contracting Company was a corporation of Illinois, and had its residence in the county of Cook, in the State of Illinois, and did not have its residence in Beardstown, in the county of Cass and State of Illinois, its principal office being fixed in its charter in Chicago, Cook county, Illinois, and therefore as the chattel mortgage was not acknowledged and recorded in Cook county, Illinois, it was void as to the trustee under the provisions of the bankruptcy act as amended and that appellant by taking possession, did not perfect its title to the dredge as against the trustee in bankruptcy, who is entitled to the dredge for the general creditors of the bankrupt and that The Fairbanks Steam Shovel Company, must surrender the dredge to the Trustee. By the agreed statement it appears also that the proof showed and the referee and the court found that while the alleged bankrupt had always represented that its principal place of business was in Cass county, Illinois, its charter stated that its principal office was in Chicago, in Cook county, Illinois, and that its charter stated also that the post office address of its business office was in Beardstown, in Cass

county, Illinois, where it did practically all its business, held nearly all its meetings and had its only office in fact, that it reported annually, as required by law, that its principal office was in Beardstown, Cass county, Illinois, to the Secretary of State of Illinois, that its charter was recorded in Cass county, Illinois, and that its principal office was never changed, also that it was incorporated to do steam shovel, all kinds of excavating, construction work, dredging and general contracting.

Affirmed on Appeal.

On appeal, the United States Circuit Court of Appeals for the Seventh Circuit, affirmed the decree. The opinion is at pages 28 to 33, printed record.

By this opinion it appears that the court decided that appellant's answer to the merits, in the absence of a plea, and its acts in contesting the merits during the pendency of the suit amounted beyond question to a consent to the jurisdiction of the subject matter of this suit, of the District Court, under the decision of the Supreme Court in Harris v. First National Bank, 216 U. S., 382. Also that although the District Court sitting in bankruptcy and hearing this petition entitled in the cause in bankruptcy, found and stated on the record that bankrupt's principal office and principal place of business under the Illinois Corporation and Recording Statutes, was in Chicago, in legal effect found that the District Court of the Southern District of Illinois, sitting in bankruptcy, had no jurisdiction under the National Bankruptcy Statute to make the adjudication and appoint the trustee, yet appellant's answer to the merits of the question of title and right of

possession was an admission of trustee's capacity to sue, in the absence of a plea, and that that prevented consideration of and settled the question of jurisdiction wrong, and the effect of the filing of the petition in bankruptcy, on the taking possession of the mortgage property in question, wrong. And that court also decided that the principal place of business of this corporation was in Chicago, in Cook county, Illinois, by its articles, from its inception, and was never changed and affirmed the decree of the court below, on the same provisions of the bankruptcy a.t.

In Bankruptcy Court, Assignments of Error.

The assignments of error on appeal from the bankruptcy court to the Circuit Court of Appeals appear on pages 18 and 19, of printed record and are, abbreviated, that (1) The District Court erred in overruling the exceptions to the report of referee. (2) Error in confirming report wherein it finds that the residence of bankrupt was in Cook county, Illinois, at the time of execution of the mortgage in question and in refusing to find its residence at that time was in Beardstown, in the county of Cass in State of Illinois. (3) Error in approving report wherein it finds the title did not become absolute in appellant as against the trustee by taking possession of said dredge. (4) Error in decreeing that temporary injunction be made perpetual. (5) Error in decreeing that said dredge be surrendeded to the Trustee in Bankruptcy. (6) Error in refusal to hold that as to appellant, the residence of bankrupt at time of executing the mortgage under the law of Illinois, was in Cass county, Illinois. (7) Error in refusing to decree that the temporary injunction be dis-

solved. (8) Error in refusing to decree that petition of bankrupt against appellant for an injunction be dismissed.

The Case Here.

The case is here on appeal, the amount in controversy being shown to be over $5000, exclusive of interest and costs, pages 41 and 42 of Record.

The Questions and How They Arise:

First: Do the Rules of Practice for courts in equity of the United States, promulgated Nov. 4, 1912, provide that failure to make the defense of want of capacity to sue in any particular way, shall be deemed an admission of capacity to sue or a waiver of that defense, when want of capacity to sue appears by the petition and evidence of plaintiff, within the issues, and is found by the court on the face of the record and does that wrongfully settle the question of the right and title to the property?

This question arises under first and second assignments of error, page 36, Record, the opinion, page 29, the third, fourth and fifth exceptions to report, Record, p. 5, and the third to eighth inclusive of the assignments of error to the Bankruptcy Court, Record, p. 18, 19, the statement, p. 2 to 11, the Report of Referee, p. 11 to 16, Record.

Second: Is the trustee in bankruptcy entitled to property, the possession of which was procured by the bankrupt by misrepresentation of material facts, from a person deceived thereby, where there was no intention that title should pass at all, nor was it intended that possession be given even, unless the facts were as misrepre-

sented, in a case where the bankrupt or trustee was plaintiff and the defendant was in possession of the property and it was not alleged nor proved that there were any creditors who could have extended credit on the faith of the ownership of the property by the bankrupt or at all while it was in its possession and possession was reclaimed after the filing of involuntary petition in bankruptcy, but without knowledge of it, and before the adjudication which was before there had been any knowledge of defendant that there had been misrepresentations?

This question arises on the Statement and Report supra, and on the third and sixth assignments of error, p. 36, Record.

Third: Will the filing of petition in involuntary bankruptcy, in the United States District Court, in the Southern District of Illinois, against a corporation whose principal place of business was fixed by its charter in the city of Chicago in the Northern District of Illinois, the mortgagor, operate to defeat the perfecting of mortgagee's title by taking possession of the property by the mortgagee under an unrecorded mortgage, and a contract retaining title, after such filing of petition and before adjudication?

This question arises on the first and second assignments of error, p. 36, Record and Sec. 2, of Bankruptcy Act.

Fourth: Had the United States District Court for the Southern District of Illinois, territorial jurisdiction and jurisdiction of the subject matter of the adjudication of a corporation bankrupt, whose principal place of business was fixed by its charter in the city of Chicago, in the Northern District of Illinois, and never changed?

This question arises on the first and second assignments of error, p. 36, Record and Sec. 2, of Bankruptcy Act.

Fifth: The question also arises whether the additional statement in its charter, that the post office address of its business office was in Cass county, Illinois, did not fix its residence for purposes of acknowledging and recording its chattel mortgages, in Cass county, Illinois, where the mortgage in question was acknowledged and recorded?

This question arises on the fact, p. 6, and on the third, fifth, thirteenth and fourteenth assignment of error, p. 36 and 37, Record.

Sixth: Had the bankruptcy court jurisdiction where there was no question of a preference or fraudulent conveyance? Was the court in Southern District of Illinois, one that would have had jurisdiction of the cause under Section 23, subdivision b, of the bankruptcy act, as amended June 25, 1910, and did the "proposed defendant" consent?

These questions arise on the fourth, seventh, ninth and twelfth Assignments of Error, p. 36, 37, Record.

Seventh: Had the bankruptcy court jurisdiction of the proceeding in equity against appellant where it appeared that plaintiff had a plain, adequate and complete remedy at law to recover the specific personal property, and if not raised in the premises, does Section 267 of the Judicial Code render the question one of such fundamental jurisdiction that it will raise itself, when obvious, and be noticed by the court, *sua sponte?*

This question arises on the eleventh and twelfth Assignments of Error, p. 37, the fifth exception to report, p. 5 and the fact that this hearing was on motion to dissolve injunction, p. 11 and 15, Record.

Eighth: Since it appears that the controversy on this petition against appellant was carried on in the bankruptcy cause, entitled therein, with all the parties participating, in full view of the bankruptcy proceeding, which was still open, was not the court bound to notice that it had no jurisdiction in either proceeding on its finding that the principal place of business of the alleged bankrupt always was in another district?

This question arises on the eighth and ninth Assignments of Error, p. 37 and the facts, pages 9, 16, 30, Record.

The Assignments of Error Relied on Here, Record, p. 36-37.

First: The said United States Circuit Court of Appeals erred in holding that answer to the merits of the question of title and right of possession of the property, in the absence of a plea, was an admission of trustee's capacity to sue, under the rules of Practice for the Courts of Equity of the United States promulgated Nov. 4, 1912, and also that that settled the question of right and title to the property and precluded the appellant from showing and precluded the court from seeing what appeared on the face of the record, that the taking possession by appellant under its mortgage and under its contract retaining in itself the title to the property until paid for in full in cash, perfected its title thereto, notwithstanding the other facts that appeared on the face of the record, that the involuntary petition in bankruptcy was filed in the wrong court and district and without the district where the alleged bankrupt had its principal place of business, resided and had its domicile, and in a court without territorial jurisdiction and without jurisdiction

of the subject matter and that consequently no petition in bankruptcy was ever filed.

Second: The said court erred in holding that any title of the plaintiff or the trustee attached to the property in question as of the date of such filing of the petition in bankruptcy in the wrong court and district or of any other date, and also erred in holding that capacity to sue was loaded like a wooden horse with capacity and right and title to recover.

Third: The said court erred in holding that the voidness of the plaintiff's and the trustee's right and title to the property and the perfection of appellant's right and title thereto, did not appear on the face of the record in the statement of facts under Rule 77, of the Rules of Practice for Courts in Equity, and by the report of the referee as special master and in the judgment and decree of the court below of which that report was made a part by confirmation.

Fourth: The said court erred in holding that the court below was a court that would have concurrent jurisdiction in the case with any state court, if bankruptcy had not intervened.

Fifth: The said court erred in holding that the alleged bankrupt resided in the Northern District of Illinois for purposes of recording and in the Southern District of Illinois for purposes of adjudication in bankruptcy and for the purposes of the proceeding below and that the contrary did not appear on the face of the record.

Sixth: The said court erred in holding that the title to the property which it was agreed should not pass and never did pass to alleged bankrupt, did pass to the alleged trustee in bankruptcy by the filing of the involuntary petition in bankruptcy in the wrong court and district.

Seventh: The said court erred in holding that a preference was ever given to appellant at any time.

Eighth: The said court erred in refusal to hold that the court below was the bankruptcy court that made the adjudication of bankruptcy in question and was without jurisdiction of the cause in bankruptcy and that the proceeding below was a proceeding in the court of bankruptcy sitting in bankruptcy that made the adjudication and in the cause in which the alleged bankrupt was adjudged bankrupt and as part of the cause, and in not reversing the judgment and decree below.

Ninth: The said court erred in refusal to hold that it did appear on the face of the record of proceeding below that the court of bankruptcy was without jurisdiction and that the alleged trustee in bankruptcy acquired no title to the property.

Tenth: The said court erred in holding that the alleged bankrupt was of the kind of corporation that could be adjudged bankrupt.

Eleventh: The said court erred in not reversing the judgment below and dissolving the injunction because the plaintiff had a plain, complete and adequate remedy at law by action to recover the specific personal property.

Twelfth: The said court erred in affirming and not reversing the judgment and decree of the court below and in not of its own motion dismissing the cause in bankruptcy below and reversing the decree against appellant.

Thirteenth: The said court erred in holding that the residence of alleged bankrupt was not at the time of executing the chattel mortgage in question in Beardstown, in the county of Cass and State of Illinois.

Fourteenth: The said court erred in not holding that at the time of the filing of involuntary petition in bankruptcy against said alleged bankrupt and for six months prior thereto, it had its principal place of business, resided and had its domicile in Cook county, Illinois.

BRIEF OF ARGUMENT.

First Question.

The rules of practice for courts in equity of the United States do not provide that failure to make the defense of want of capacity to sue in any particular way, shall be deemed an admission of capacity to sue or a waiver of that defense, when want of capacity to sue appears by the petition and evidence of plaintiff, within the issues, and is found by the court on the face of the record.

Ordinarily, inadvertence and ignorance of the facts, the inability to see in advance the facts as they will appear on the record, should not be taken in place of a voluntary admission or an admission by force of legislative power and provision. For instance, Sections 11309, 11310, 11311, of the General Code of Ohio, first enacted sixty some years ago, by the great men of that time, provide, that the defense of want of capacity to sue may be made by demurrer or answer, and, "if not made in either way, the defendant shall be deemed to have waived it." See also Secs. 2649, 2653, 2654, and 3070 of Wisconsin Revised Statutes of 1898, and Sec. 19 of Bankruptcy Act.

This court by its rules, left the defense of want of capacity to sue, in equity, to raise itself, like the defense of want of facts and the jurisdiction of the subject matter.

Even before the new rules it was not necessary to raise such questions by plea. They would be noticed if obvious.

> Singer Sewing Machine Co. v. Benedict, 229 U. S., 481.

Congress alone could waive capacity to sue here, if the trustee was not trustee. Sec. 23b Bankruptcy Act as amended June 25, 1910.

Here the petition and the evidence of plaintiff, within the issues, established this want of capacity to sue and the court found it and stated it on the face of the record. Printed Record, pages 12, 14, 15, 16. But the court by inadvertence entered up the wrong decree.

This court as long ago as 1839, in the case of, The Society, etc. v. The Town of Pawlet and Clarke, 4 Peters, 480, recognized the difference between the capacity or competency, "to sue generally, or in the particular action which they bring," and the right and title and capacity to hold the property. After the capacity to sue had been admitted by the plea of the general issue, there was quite a lawsuit over the right and title and capacity of the plaintiff to recover the property; which was determined by this court on the evidence and not on the admissions of the plea.

SECOND QUESTION.

Sec. 47, clause 2 of subdivision a, of bankruptcy act, as amended June 25, 1910, gives the trustee as to all property not in the custody of the court, the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. That is, he is placed in a position to proceed in aid of execution but he has not yet seized the property. This section also provides that on the property in the possession of the court, he shall have a lien as by attachment. Appellant contends that even then his rights would be superior to those of the trustee. And his rights here depend on the law of Illinois.

The bankruptcy law does not make of the trustee a receiver of stolen goods nor require him to sequester the goods of anyone but the bankrupt. It makes little difference to a man whether his goods are taken by mistake or

fraud. He wants them back in either case and the general creitdors of the one who takes them should want him to have them back, if the general creditors were not deceived into giving credit.

Where possession of property is procured by fraud or mistake by a person who is afterwards adjudged bankrupt, it is true at least that unless there are subsequent creditors who could have given credit on the faith of the ownership by bankrupt, the title is defeasible in the hands of the trustee, and the burden is on whichever party is plaintiff to show about this. This court in the case of Montgomery, Assignee v. The Bucyrus Machine Co., 92 U. S., 257, held that as no creditors were deceived into giving credit on the apparent ownership of the property by the bankrupt, that the defrauded vendor was entitled to the property, as against the assignee in bankruptcy. There was a like holding in Donaldson, Assignee v. Farwell, 93 U. S., 631.

The Law in Illinois.

It is the law of Illinois, that on a conditional sale, if no creditor has given credit to the vendee on the faith of the ownership of the property while it is in his possession the vendor may reclaim the property and his rights are superior.

In Ketchum v. Watson, 24 Ill., 592, the trial court gave this instruction:

"If the plaintiff sold Outlaw a horse, conditioned that it should not be his property until paid for, and that Ketchum was cognizant of such contract, they will find for the plaintiff, unless the property was in possession of

Outlaw, and the indebtedness accrued to Ketchum before such notice and while Outlaw had said horse in possession; and if such be the case you will find for the defendant." Ketchum had caused execution to be levied on the horse while it was in possession of Outlaw, on a judgment against him.

On p. 593 the Supreme Court of Illinois, says: "We think the court erred in giving it without this material qualification, namely, that Ketchum was cognizant of the contract, before he gave credit to Outlaw."

"This view rendered it necessary that the court should have given the third instruction asked by the defendant, that unless they believe from the evidence, that Ketchum had notice of the sale to Outlaw, before he purchased the notes, they will find for the defendant. It was error to refuse this instruction."

How different in Illinois is the effectiveness of delivery of possession of personal property reserving the title and the attempt to convey the title while withholding the possession, is shown by comparing the above case with the one of the same title on the preceding page of the same report, 21 Ill. 591.

In Van Duzor v. Allen, 90 Ill., 499 at page 503 the court says:

"Here, these creditors seem to have held just debts against Gaston and they obtained judgments therefor, and obtained executions and levied them upon the property whilst it was in [his] possession and they both swore they had no notice of the terms of the purchase, or that he was not the owner and the jury seem to have believed them." The case shows that these debts were incurred by Gaston while he was in possession.

In Gilbert v. Nat. Cash R. Co., 176 Ill., 288, at page 297 the court says:

"In Van Duzor v. Allen, supra, we held that a *bona fide* creditor, who, under a judgment and execution acquires a lien on property while in the actual possession of a vendee by delivery from the vendor, or taken and held by his consent, occupies the same position in all respects as a *bona* fide purchaser from such vendee." *Bona fide* creditor, here, must mean what the facts of the Van Duzor case required; that is, subsequent creditor who gave credit while the property was in possession of vendee, in good faith, relying on his ownership of the property to render him able to pay.

This case also shows that a contract of sale of personal property reserving the title in the seller until paid for, is valid as between the parties, and is not required or authorized to be recorded by the laws of Illinois.

Since the bankrupt or trustee was plaintiff here, the burden should be on him to show that there was at least one creditor who could have given credit to bankrupt while the dredge was in its possession. Miller v. New Orleans Acid. & F. Co., 211 U. S., 196. Otherwise he would recover and the matter would become *res judicata*, although it might be that there was no creditor whose rights were superior to defendants or who had any equity at all because either all creditors had knowledge of defendant's rights at all times or because all gave all the credit they did give before the property in question came into the possession of the bankrupt. If creditors had brought this suit, instead of the bankrupt, the dates when they gave credit would naturally have appeared. All that is stated or found here about creditors of this bank-

rupt, is, that "certain creditors" filed the involuntary petition. Record, page 3 and 11; except that on page 4 it appears that these creditors were secured by mortgages on other dredges.

Holt v. Crucible Steel Co., 224 U. S., 262.

While the recording of a chattel mortgage within four months etc., under the amendment of June 25th, 1910, might constitute a preference under certain circumstances, the taking possession under the circumstances here would not. There must have been a conveyance within four months to have that effect and here there was none whatever. The title was retained.

Thompson v. Fairbanks, 196 U. S., 516.

But the amendment of June 25, 1910, of the Bankruptcy Act can have no detrimental effect on this transaction which occurred in 1907. It would impair the obligation of the contract to make it void or its realization more hazardous; and such an intention will not be imputed, if not expressed.

Holt v. Henly, Trustee, U. S. Supreme Court, Oct. Term, 1913, Decided March 16, 1914, Advance sheet April 15, 1914.

THIRD AND FOURTH QUESTIONS.

The filing of the petition in involuntary bankruptcy in a court outside of the district where the alleged bankrupt, a corporation, had its principal place of business fixed by its charter, was very much like the filing of the chattel mortgage in the wrong county for record which everyone can see is no filing; and such court has no jurisdiction whatever.

Under the bankruptcy act of 1898, Sec. 2, the United States District Courts "within their respective districts" are given territorial jurisdiction and jurisdiction of the subject matter to adjudge corporations and natural persons bankrupt, "who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months," etc. The phraseology of other bankruptcy acts is different.

The court below found and stated in its conclusions of fact and law on the face of the record that the alleged bankrupt was a corporation and that during all of its existence, had its principal place of business, resided and had its domicile without the territorial jurisdiction of the bankruptcy court below, the Southern District of Illinois, and within the adjoining, the Northern District of Illinois. (Record, pages 11 to 17.)

The words, "principal place of business" and "principal office" had acquired at the time of the passage of the bankruptcy act a technical and talismanic use and signification in connection with the fixing of the residence and domicile of corporations in their charters and had become as sacred as the words of Shelley's case, the words, "and unto his heirs."

Congress used them in Sec. 2 of the act as the appropriate corporate synonym to indicate residence and domicile of the artificial persons who might be adjudged bankrupt. They do not apply to the natural persons who may have a domicile in one place and a residence where they do business in another, as "ambassadors resident of a foreign court." Most of the cases where bankruptcy was adjudged in a jurisdiction foreign to that of the domicile

are explained by the fact that they are all cases of natural persons and partnerships and the adjudication could be either at place of domicile or of residence where they did business.

Federal Contracting Company did not eat or sleep, but only did business. It was located by its charter and it was only an entity that operated from a center, sending out its officers and agents to execute its commands and carry its authority but none of its essence. This center is residence and domicile and principal office or principal place of business all in one. In reasoning about it care should be used to stick to the exact formula which Congress adopted from the state statutes; for if the words are varied as great an error may result as in the careless use of algebraic or chemical formulae. Just vary it to "Where it does the most of, or the larger part of its business" and you get away from exact documentary and record proof of where it resides and where jurisdiction may be exercised over it, to all the uncertainties that bankruptcy laws and courts have labored for a century or more to avoid. It was bankruptcy courts that invented "residence" away from "domicile" because "residence is a fact easy of proof, while domicile is a question difficult of solution." So corporations were required to locate in their charters this principal place of business that there might be no difficulty in determining their location or residence.

Century Dictionary, "Residence," "Domicile."
Pelton v. Northern Transportation Co., 37 O. S., 450.
Western Transportation Co. v. Schen, 19 N. Y., 408.
Ex Parte Schallenberger, 96 U. S., 369.

Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S., 496.
Hewitt v. General Electric Co., 164 Ill., 120.
Jenkins v. California Stage Co., 22 Cal., 537.

In this way this court worked out the citizenship of corporations for purposes of jurisdiction.

St. L. & S. F. R. Co. v. James, 161 U. S., 545.
Southern Ry. Co. v. Allinson, 199 U. S., 326.
Galveston, H. & S. A. Ry. Co. v. Gonzales, 151 U. S., 496.

A corporation must dwell in the place of its creation and cannot migrate to another sovereignty, unless by virtue of legislation.

Bank v. Earle, 13 Peters, 521 at 588.
Canada So. R. R. Co. v. Gebhard, 109 U. S., 527.

There has been much diversity of decision in the lower courts on the question of what court has jurisdiction to adjudge a corporation bankrupt. Some hold that only the court in the district in which the principal place of business has been fixed in the charter of the corporation has jurisdiction and that courts elsewhere are without jurisdiction. Others hold that wherever the corporation does the larger part of its business, even if in a state foreign to its domicile, it may be adjudged bankrupt by a court there.

The U. S. Circuit Court of Appeals for the First Circuit in the case of White Mountain Paper Co. v. Morse & Co., 127 Fed., 643, on appeal from the District Court for the District of New Hampshire, from a decree adjudging the White Mountain Paper Co., a corporation of New Jersey, which never did business and had no property in

New Jersey, bankrupt, on an involuntary petition against it, where the parties had expressly waived all questions of jurisdiction, doubted: "The determination, however, how far courts, other than those of domicile of the corporation against which proceedings of a general administrative character are taken, can, by its consent, accept jurisdiction thereof is involved in some difficulty."

In accord with this doubt are the decisions in,

In re Elmira Steel Co., 109 Fed., 456.
In re United Button Co., 137 Fed., 668.
In re The B. H. & E. R. R. Co., 9 Blatchford, 101.
In re Alaska American Fish Co., 162 Fed., 498.

On the other side are many cases where there was little or no contest on this question, such as,

In re Pennsylvania Coal Co., 163 Fed., 579.
In re Duplex Radiator Co., 142 Fed., 906.
In re Machine & Conveyor Co., 91 Fed., 630.
Tiffany v. La Plume Con Milk Co., 141 Fed., 444.
Dressel v. N. S. Lumber Co., 107 Fed., 255.

In re Mathews, Con. Slate Co., 144 Fed., 737, the court held that a corporation of New Jersey whose principal office was fixed by its charter in Jersey City, N. J., could be adjudged bankrupt by the court in Massachusetts, on the theory that it had its principal office in Boston.

Chief Justice FULLER, in Louisville Trust Co. v. Comingor, 184 U. S., at page 26, said:

> "Jurisdiction as to the subject matter may be limited in various ways, as to civil and criminal cases, cases at common law and in equity or in admiralty, probate cases, or cases under special statutes, to particular classes of persons, to proceedings in particular modes, and so on."

Here the court below lacked territorial jurisdiction and jurisdiction of the subject matter *and found and stated it on the record.* Where facts material to the issues appear, that show want of jurisdiction, the court must dismiss, *sua sponte*. Here the fact that the principal place of business of the bankrupt was in Chicago, Cook county, in the Northern District, and not in Beardstown, Cass county, Illinois, in the Southern District of Illinois, was the very question at issue on which both decisions below were founded.

Hartog v. Memory, 116 U. S., 588.

Fifth Question.

The effect of the additional statement in the charter, of the post office address, of the business office, as at Beardstown, does not seem to have been determined by any State Court in Illinois. It is hard to imagine what the purpose was, unless it was to indicate where chattel mortgages should be acknowledged and recorded. The purpose of the incorporators was probably to give the corporation two principal places of business.

Sixth Question.

The bankruptcy court had no jurisdiction of this independent proceeding, on the facts developed against appellant. It was alleged that the mortgage was invalid as against the rights of the trustee to be appointed. Invalid was used as void because cancellation was not asked. It was claimed that the late amendments of the bankruptcy act rendered the unrecorded instrument void as against the trustee although it was valid between the parties to it, and that his rights accrued upon the filing of the peti

tion. These rights were not fixed but must still be ascertained and fixed in proceedings in aid, but not by injunction against an adverse claimant.

The court in the Southern District of Illinois was not one that would have had jurisdiction of the proceeding against appellant if bankruptcy had not intervened and it had been sued by the bankrupt. There would be no Federal question between them and diversity of citizenship would have to appear. And it did not appear that the "proposed defendant" was a citizen of a different state from the bankrupt; and the "proposed defendant" did not consent within the meaning of Section 23, Subdivision b, of the bankruptcy act as amended June 25, 1910, which reads as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under Section sixty, subdivision b; Section sixty-seven, Subdivision e; and Section seventy, Subdivision e."

It is to be noticed that it is the "proposed defendant" and not the defendant who must consent. And this provision seems to have been made advisedly to save useless expense in trying, by experiment, whether the defendant would consent by answer or object by plea, at an expense for each experiment, including with costs, the fee of trustee's counsel, of a sum exceeding perhaps one hundred dollars, besides the expense and loss by delay. If this were ascertained from the "proposed defendant," his consent in writing might be filed with the petition, without

expense to the estate; or the suit be brought where he could not object. That would seem to be the purpose and the saving to estates made it worth while to so provide. If bankruptcy courts would make that requirement of trustees the saving in the aggregate would be very great.

The proposed defendant here did not consent to be sued anywhere. The first it knew of the suit was when an injunction, allowed without notice in a case where process had not issued, was served on it. It did nothing but move to dissolve it, filing an answer in support of the motion.

Under former rules of practice it was held in a class of cases not under said Sec. 23, Subdivision b, supra., that failure to claim the privilege of being sued in one's own district or of not being sued elsewhere, by plea, and answering to the merits was a waiver of that privilege. But under the new rules there is no provision for consent by inadvertence. It is not provided that to act in a certain way or failure to act, shall be deemed to be consent or waiver. If this pitfall is still in the rules, there is no warning light or barrier to give notice of the danger in this much traveled way. The language used in this section would seem to mean voluntary consent or consent by prescribed conduct, to which the legislative power had given that meaning. Even then the ordinary man, the man of the great majority, for whose benefit justice is instituted, would stumble, by reason of his habits of thought.

The case stated in the petition was based on the Federal bankruptcy act and the court decided it on the provisions of that act as amended June 25, 1910, but the case made on the finding and agreed statement of facts under Rule 77 did not support the allegations of the petition nor the decision in that respect.

The case so made was not under Sec. 60, Subdivision b, as amended June 25th, 1910, because the conditional sale was several years before and the chattel mortgage was more than four months before any supposed filing of any petition in bankruptcy against mortgagor. There was no subsequent recording or registering by appellant and the condition of the sale or the mortgage did not operate as a preference and the person receiving it or to be benefited thereby or his agent do not appear by any finding or statement of facts in this case, to have, then or at anytime, had reasonable cause to believe that the enforcement of the transfer would effect a preference.

The case so made was not under Sec. 67, Subdivision e, for there was no fraudulent conveyance; and the only one ever in danger of being defrauded was not the creditors, other than this mortgagee, appellant.

The case so made was not under Sec. 70, Subdivision e, for there could be no creditor who could avoid this retained title under the circumstances shown. And the allegations of the petition did not make out a case under these exceptions.

Harris v. First National Bank, 216 U. S., 382.
In re Rochford, 59 C. C. A., 388 at 391.
M. C. & L. M. R. Co. v. Swan, 111 U. S., 379, 382.
Morris v. Gilmer, 129 U. S., 315.
Lovell, Trustee v. Newman, 227 U. S., 412.

SEVENTH QUESTION.

Under the equity rules this question of adequate remedy at law, was not waived by failure to make it. It was made below however in exception 5 to report of referee. The proceeding was for injunction, but the recovery was in replevin against an adverse claimant without the inter-

vention of a jury. Section 267 of the Judicial Code, would seem to require the court, *sua sponte*, to dismiss this proceeding in equity, when it appeared quite obvious on the face of the record that the plaintiff, on the facts, had a plain, adequate and complete remedy at law to recover the specific personal property. At most the injunction should not have been continued beyond time for an officer to take possession of the property on a writ of replevin.

Singer Sewing Mach. Co. v. Benedict, 229 U. S., 481.
Mackall v. Casilear, 137 U. S., 556.
Scott v. Neely, 140 U. S., 110.
Parker v. W. Lake Co., 2 Black, 545.
Lewis v. Cocks, 23 Wall., 466.
Sullivan v. P. R. Co., 94 U. S., 806.

Eighth Question.

Since the controversy on this petition against appellant was carried on in the bankruptcy cause, entitled therein, with all parties participating, in full view of the bankruptcy proceeding, which was still open, the court was bound to consider its jurisdiction in both proceedings on its finding that the principal place of business of the alleged bankrupt always was in another district. And it should have, *sua sponte*, dismissed both.

Butler v. Eaton, 141 U. S., 240.

CONCLUSION.

The decree against this appellant, in both courts below, should be reversed, the injunction dissolved and the petition dismissed.

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